190

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

No. 2719.

JOSEPH E. WISE and LUCIA J. WISE,
*Appellants,*

*vs.*

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR., JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,
*Appellees.*

---

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,
*Appellants,*

*vs.*

JOSEPH E. WISE and MARGARET W. WISE,
*Appellees.*

---

JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN,
*Appellants,*

*vs.*

JOSEPH E. WISE and MARGARET W. WISE,
*Appellees.*

---

SANTA CRUZ DEVELOPMENT COMPANY, a Corporation,
*Appellant,*

*vs.*

CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., ET AL.,
*Appellees.*

---

## BRIEF ON BEHALF OF APPELLEES CORNELIUS C. WATTS AND DABNEY C. T. DAVIS, JR.

---

HERBERT NOBLE,
SAMUEL L. KINGAN,
*Of Counsel.*

SAMUEL L. KINGAN,
HARTWELL P. HEATH,
*Attorneys for Watts and Davis.*



C. G. BURGOYNE, 72 to 78 Spring Street, New York.

# INDEX.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2719.

JOSEPH E. WISE and LUCIA J. WISE, Appellants vs. CORNELIUS C. WATTS, and DABNEY C. T. DAVIS, JR., JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN and HELEN LEE BOULDIN, Appellees.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR., Appellants vs. JOSEPH E. WISE and MARGARET W. WISE, Appellees.

JAMES E. BOULDIN, JENNIE N. BOULDIN, DAVID W. BOULDIN, and HELEN LEE BOULDIN, Appellants vs. JOSEPH E. WISE and MARGARET W. WISE, Appellees.

SANTA CRUZ DEVELOPMENT COMPANY, a Corporation, Appellant vs. CORNELIUS C. WATTS, DABNEY C. T. DAVIS, JR., ET AL., Appellees.

## BRIEF ON BEHALF OF APPELLEES CORNELIUS C. WATTS AND DABNEY C. T. DAVIS, JR.

### Statement of Case.

These are appeals by one of the defendants below Santa Cruz Development Company, from the whole of the decree

entered in the above entitled action on November 1, 1915 (rec., pp. 542, 622) and by the defendants below, Joseph E. Wise, Lucia J. Wise, M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox, and Eldredge I. Hurt from the portion of the decree that recognized the title of the plaintiffs below, appellees here, Cornelius C. Watts and Dabney C. T. Davis, Jr., to an undivided eighteen-nineteenths interest in the south half of the tract of land, the title to which is sought to be quieted herein, and to that portion of the decree that recognized the title of the defendants below, appellees here, Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin to an undivided eighteen-nineteenths in the north half of said tract (rec., p. 541).

There are also appeals by the plaintiffs below, Cornelius C. Watts and Dabney C. T. Davis, Jr., and by the defendants below Jennie N. Bouldin, David W. Bouldin, Helen Lee Bouldin and the Santa Cruz Development Company from that portion of the decree which recognized the title of the defendants below, Joseph E. Wise and Margaret W. Wise, to an undivided one thirty-eighth interest each in the said tract of land (rec., pp. 539, 540); but these latter appeals have been dealt with in a separate joint brief by the appellants therein and will not be discussed in this brief which will be confined to the appeals first mentioned.

The action was commenced June 23, 1914, in the District Court of the United States for the District of Arizona by the filing of a bill of complaint to quiet title and remove cloud by Cornelius C. Watts and Dabney C. T. Davis, Jr., who alleged that by mesne conveyances they had succeeded to the title of the heirs of Luis Maria Baca to a tract of land situate in Santa Cruz County, State of Arizona, particularly described as follows:

> "Commencing at a point one mile and a half from the base of the Salero Mountain in a direction North forty-five degrees East of the highest point of said

> mountain, running thence from said beginning point West twelve miles, thirty-six chains and forty-four links ; thence South twelve miles, thirty-six chains and forty-four links; thence East twelve miles, thirty-six chains and forty-four links ; and thence North twelve miles thirty-six chains and forty-four links to the place of beginning (rec., pp. 3–25).

By stipulation it was agreed that the answers of the several defendants below should have the force and effect of cross-bills, and they are to be considered on these appeals in that light (rec., p. 119).

The Santa Cruz Development Company denied that the deed from one John S. Watts to Christopher E. Hawley (rec., p. 28), one of the predecessors in title of Cornelius C. Watts and Dabney C. T. Davis, Jr., conveyed the land above described and claimed that the heirs of John S. Watts conveyed the said land to the predecessor in title of the Santa Cruz Development Company (rec., pp. 34, 35).

Joseph E. Wise, Lucia J. Wise, M. I. Carpenter, Patrick C. Graves, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt denied that John S. Watts conveyed the land to Hawley, and claimed that the heirs of John S. Watts had prior to the conveyance by them to the Santa Cruz Development Company conveyed an undivided two-thirds interest in said land to one David W. Bouldin under whom they claimed title. Joseph E. Wise and Margaret W. Wise denied that all the heirs of Luis Maria Baca conveyed their interests in said land to John S. Watts and claimed that there was a nineteenth heir, a son named Antonio, whose interest was not conveyed, and that they had succeeded by mesne conveyances to the title of said Antonio (rec., pp. 39, 60, 61, 115). Joseph E. Wise also claimed an interest by reason of an execution sale under a judgment against the administrator of David W. Bouldin (rec., pp. 67–70). Joseph E. Wise and Lucia J. Wise claimed certain particular tracts within the larger tract by reason of occupation and possession

under homestead entries or by enclosure, occupation and possession (rec., pp. 73, 78, 79).

Jennie N. Bouldin, David W. Bouldin and Helen Lee Bouldin claimed that, if the deed from John S. Watts to Hawley did not convey the said tract of land, they had an undivided two-thirds interest in said land under the conveyance by the heirs of John S. Watts to David W. Bouldin prior in right to that claimed by Joseph E. Wise, M. I. Carpenter, Patrick C. Ireland, Ireland C. Graves, Anna R. Wilcox and Eldredge I. Hurt; or, if the deed from Watts to Hawley did convey said land, that they had acquired title to the north half of said tract through the same line of title as Cornelius C. Watts and Dabney C. T. Davis, Jr. (rec., pp. 86, 88).

The decree (rec., pp. 536-539) was that the absolute title in fee simple to the whole tract of land was vested and thereby quieted in the plaintiffs Cornelius C. Watts and Dabney C. T. Davis, Jr., to the extent of an undivided eighteen-nineteenths of the south half of said tract, and in the defendant, Jennie N. Bouldin, to the extent of an undivided eighteen-thirty-eights of the north half of said tract, and in the defendant, David W. Bouldin, to the extent of an undivided eighteen-seventy-sixths of the north half of said tract, and in the defendant Helen Lee Bouldin, to the extent of an undivided eighteen-seventy-sixths of the north half of said tract, and in the defendant Joseph E. Wise, to the extent of an undivided one-thirty-eight of the whole of said tract and in the defendant Margaret W. Wise, to the extent of an undivided one-thirty-eighth of the whole of the said tract.

## Statement of Facts.

Congress by the sixth section of the Act of June 21, 1860, provided:

> " That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract as is claimed by

> the town of Las Begas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number; and it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them; provided, however, that the right hereby granted shall continue in force for three years from the passage of this act, and no longer."

On June 19, 1855, John S. Watts had presented to the Surveyor General of New Mexico as required by the Act of July 22, 1854, and the rules and regulations issued thereunder by the Secretary of the Interior, a petition on behalf of the surviving heirs at law of Luis Maria Baca in which he gave a list of such heirs (rec., 403); and the allegations of the petition were testified to be correct by witnesses who knew Baca and his family (rec., p. 405); and the surveyor general had reported to Congress that the claim of the petitioners to Las Vegas Grandes was valid and superior to that of the Town of Las Vegas which latter also appeared to be a valid grant but for the existence of the prior grant.

On June 17, 1863, John S. Watts as attorney for the heirs of Luis Maria Cabeza de Baca presented to the surveyor general of New Mexico a notice of the selection and location, " as one of the five locations " authorized by the said Act of June 21, 1860, of the tract of land particularly described (rec., p. 174), hereinafter referred to as the 1863 location.

On April 9, 1864, the Commissioner of the General Land Office approved the selection and location referring to it as Location No. 3, and ordered its survey (rec., p. 175).

No survey was made, however, until 1905 when Philip Contzen surveyed the land (rec., pp. 192, 378) which survey was approved and filed December 14, 1914, thereby for the

first time segregating the land from the public domain (rec., p. 193).

Prior to May 1, 1864, Jesus Baca y Lucero and his wife had conveyed to Jesus Maria Baca all their interest in the lands of Luis Maria Baca, deceased; Manuel Baca had conveyed to Tomas C. de Baca all the land the grantor might receive as heir of his deceased father, Luis Maria Cabeza de Baca ; Ignacio Baca and his wife had conveyed to Tomas C. de Baca the interest of Ignacio as heir of his deceased father, Ramon Baca, in the land of Luis Maria Baca, deceased (rec.. p. 174) ; and the heirs of Luis Maria Cabeza de Baca had given Tomas C. de Baca a power of attorney to convey the land in suit to John S. Watts (rec., 417).

On May 1, 1864, a number of persons describing themselves as descendants of Luis Maria Baca, by a deed to John S. Watts (rec., pp. 154–163) " for and in consideration of the services of John S. Watts for many years in and about the business of said heirs of Luis Maria Baca, as the attorney of said heirs, and for the further consideration of Three Thousand Dollars, paid by the said John S. Watts to Tomas Cabeza de Baca, our attorney in fact, have bargained, sold and conveyed, and by these presents do bargain, sell and convey to the said John S. Watts, of Santa Fe, New Mexico, and to his heirs and assigns forever, all our right, title and interest and demand in and to the following lands located upon by us as the heirs of Louis Maria Baca, under the 6th section af an Act of Congress approved June 21st, 1860 ", describing, among others, " Location No. 3 " by the courses and distances of the land above particularly described, and covenanting that they were seized in fee of the land and had good right and title to the same, that the land was free from incumbrances and that they had full power to sell and convey the same, that John S. Watts, his heirs and assigns, should quietly enjoy the land forever free from all claim of the said heirs of Luis Maria Baca, their heirs, executors and administrators, that the

grantors would warrant the title against all claims arising under them as heirs of Luis Maria Baca or under their heirs, executors and administrators, and that John S. Watts and his assigns should forever enjoy the land in as full and ample a manner as the heirs of Luis Maria Baca held and enjoyed the same just before the execution of the deed.

On April 30, 1866 (rec., pp. 176, 177) John S. Watts made application to the Commissioner of the General Land Office "to change the initial point so as to commence at a point three miles west by south from the building known as the Hacienda de Santa Rita," alleging that a mistake had been made in such initial point by reason of a want of a clear idea as to the direction of the different points of the compass due to a personal examination of the locality prior to the location having been prevented by the existence of war in that part of the Territory of Arizona and the hostility of the Indians.

On May 21, 1866 (rec., pp. 177, 178), the Commissioner of the General Land Office issued instructions to the surveyor general of New Mexico to cause a survey to be executed in accordance with the amended description, hereinafter referred to as the 1866 location.

On January 8, 1870 (rec., 193–196), John S. Watts made a deed to Christopher E. Hawley, wherein and whereby, for and in consideration of one dollar and other valuable considerations he "remised, released and quit-claimed * * * unto the said party of the second part, and to his heirs and assigns forever, all that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing One hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D., 1864, bounded and described as follows: Beginning at a point three miles West by South from the build-

ing known as the Haciendo de Santa Rita, running thence north twelve miles, thirty-six chains and forty-four links; running thence east twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence west twelve miles, thirty-six chains and forty-four links, to the point or place of beginning. The said tract of land being known as Location No. 3 of the Baca Series, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances: To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever."

On January 13, 1870 (rec., p. 207) Christopher E. Hawley gave James Eldredge a power of attorney to sell, dispose of and convey " all of his right, title and interest in all that certain tract, piece or parcel of land containing one hundred thousand acres be the same more or less granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to John S. Watts of Santa Fe, in the Territory of New Mexico, by deed dated the 1st day of May, A. D., 1964, and by the said Watts conveyed to me (Christopher E. Hawley) by deed dated the 8th day of January 1970 " describing the land by the courses and distances of the 1866 location.

On May 30, 1871 (rec., pp. 197–207), a number of persons describing themselves as decendants of Luis Maria Baca, by deed to John S. Watts, "for and in consideration of the sum of six thousand and eight hundred dollars, paid by John S.

Watts to Tomas Cabeza de Baca, Agent and attorney in fact of the heirs of Luis Maria Baca, deceased," after covenanting that they were " the sole lawful heirs of Luis Maria Baca," that they were " siezed in fee of said land " and had " good right and title to the same and authority to sell and dispose of the same," that the said John S. Watts, his heirs and assigns, should " quietly enjoy the possession of said land free from all claims or demands of the said heirs of Luis Ma. Baca, their heirs, executors, administrators and assigns " and that they would " defend and protect the title of the said John S. Watts, his heirs and assigns, to the said lands against all claims and demands arising through or under us as heirs of the said Luis Maria Baca, deceased, or under persons claiming to be heirs of Luis Ma. Baca, deceased " ; and that the said John S. Watts, his heirs and assigns, should have and hold " said lands in as full, perfect and ample a manner as the said heirs of Luis Ma. Baca, deceased, had and held said lands just before the execution of said conveyance ", continued " and the said heirs of Luis Ma. Baca, above mentioned, now ratify and confirm the title made by us and by our attorney, Tomas Cabeza de Baca, to John S. Watts, his heirs and assigns, on the 1st day of May, 1884, for the lands described in * * * Location Number Three, situate in Arizona Territory containing $99{,}289\frac{39}{100}$ acres, the boundaries of which are set forth and described in said deed ; And the said heirs of Luis Maria Baca, deceased, executing this deed as herein set forth, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described."

On May 5, 1884 (rec., pp. 208–210) Christopher E. Hawley by James Eldredge as his attorney in fact conveyed to John C. Robinson " all his right, title and interest whatever the same may be in and to that certain tract of land situate, lying and being in the Santa Rita Mountains in the Territory of

Arizona, containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States, and by said heirs conveyed to John S. Watts of the Territory of New Mexico, by deed dated on the first day of May, 1864, and by said Watts conveyed to the said Christopher E. Hawley by deed dated on the eighth day of January, 1870," describing it by the 1866 location and continuing "The said tract of land being known as Location No. 3 of the Baca series, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, in and to the above described premises and every part and parcel thereof, with the appurtenances, including in this conveyance, all the rights and claims of the heirs of said Baca, or of those persons claiming under them, that is to say, all the right, title and interest of the said party of the first part to said location, or to any location elsewhere, under the Act of Congress approved June 21st, 1860, or under any decision of any Department of the government, made, or hereafter to be made, or Act of Congress passed, or to be passed."

On November, 19, 1892, John C. Robinson conveyed to Powhatton W. Bouldin and James E. Bouldin one-half of the tract of land describing it by the courses and distances of the 1866 location after which follows this sentence: "The said tract of land bounded and described in the sentence immediately foregoing, this being the northern half of the tract known as location number 3 of the Baca series."

On December 1, 1892 (rec., pp. 255-257), John C. Robinson conveyed to John W. Cameron "all his right, title and interest in and to that certain tract of land situate, lying and being in the County of Pima, Arizona Territory, the same being the southern half of the tract of land known as Baca

Float No. 3 " describing it by the courses and distances of the 1866 location.

On November 28, 1892, (rec., pp. 226–228), John W. Cameron executed a declaration of trust that he held the said southern half of Baca Float N. 3 in trust to dispose of the same in his discretion without any liability on the part of the purchaser to see the application of the purchase money, and to pay out of the proceeds derived from any disposition of said southern half of Baca Float No. 3, (1) to John C. Robinson ten per cent.; (2) to retain ten per cent. to be divided equally between him, John W. Cameron and Mrs. A. T. Belknap; (3) to hold fifteen per cent. pending a settlement between James Eldredge and Charles A. Eldredge, and (4) to pay the balance to James Eldredge or as he might in writing direct.

On September 22, 1893 (rec., pp. 210–212), John C. Robinson, after reciting the conveyance to Cameron of "that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3," and after reciting that Cameron held said land upon the trusts stated in the declaration of trust aforesaid including the payment to said Robinson out of the proceeds of sale when said land should be sold of ten per cent. of such proceeds, and the payment of a note for $250 endorsed by said Robinson, conveyed to Alex F. Mathews all his right, title and interest in and to the said land and to the proceeds thereof under said trust and directed the said Cameron to convey the said land to the said Mathews.

On September 22, 1893 (rec., pp. 220–223), John W. Cameron and Mrs. A. T. Belknap, after reciting the conveyance by Robinson to Cameron of "that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3" and after reciting that Cameron held said land upon the trusts stated in the declaration of trust aforesaid including the payment to Cameron and Mrs. Belknap of five per cent. each out of the proceeds of sale of said land when sold, con-

veyed all their right, title and interest in and to the said land and to the proceeds thereof to Alex. F. Mathews and directed the said Cameron to convey the said land to the said Mathews.

On September 22, 1893 (rec., p. 226), James Eldredge, after reciting the conveyance by Robinson to Cameron of " a certain tract of land in said county (Pima) and territory (Arizona) which is described as follows: viz: that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3," and after reciting the trusts upon which Cameron held said land including the payment to said James Eldredge of a certain proportion of the proceeds of said land when sold, conveyed all his right, title and interest in said land and in the proceeds thereof to Alex. F. Mathews and directed the said Cameron to convey the said land to the said Mathews.

On September 22, 1893 (rec., pp. 223–226), Charles A. Eldredge, after reciting the conveyance by Robinson to Cameron of " a certain tract of land in said county (Pima) and territory (Arizona) which is described as follows, viz: that certain tract of land which is the southern half of the tract of land known as Baca Float No. 3 " and after reciting the trusts upon which Cameron held said land including the payment to said Charles A. Eldredge of fifteen per cent. of the proceeds of said land when sold, conveyed all his right, title and interest in said land and in the proceeds thereof to Alex. F. Mathews and directed the said Cameron to convey the said land to the said Mathews.

On September 25, 1893 (rec., p. 223), John W. Cameron after reciting the conveyance by Robinson to him of " a certain tract of land in said county (Pima) and territory (Arizona) being the southern half * * * of the tract known as the Baca Float No. 3 " and after reciting the trusts upon which he held said land, that the several trusts had been complied with and that the parties interested in the said land or its proceeds had assigned their interests to Alex. F. Mathews and had directed him to convey

said land to said Mathews, conveyed to said Mathews the land conveyed to Cameron by Robinson and described it as follows: " that certain tract of land situate in Pima County in Arizona Territory which is the southern one-half of the tract of land known as Baca Float No. 3."

Alex. F. Mathews died December 10, 1906 (rec., p. 149), leaving him surviving as his sole next of kin and heirs at law, his widow, Laura G. Mathews, his sons, Mason Mathews, Charles G. Mathews and Henry A. Mathews, and his daughter, Elizabeth P. Mathews.

Various proceedings were had in the land department in the endeavor to get a survey made; and the Secretary of the Interior finally decided, July 25, 1899 (rec., p. 182), that the application of John S. Watts of April 30, 1866 (rec., p. 176), was not an amendment of the location of June 17, 1863 (rec., p. 174), but was an attempt to re-locate the float after the expiration of the three years fixed by the statute as the time within which the selection and location must be made and that the action of the Commissioner of the General Land Office (rec., p. 177) purporting to grant the application was without authority and void and that the claimants must abide by the 1863 location.

On February 8, 1907 (rec., pp. 214–216), the heirs of Alex. F. Mathews conveyed to C. C. Watts and Dabney C. T. Davis, Jr., the appellees here,

> " all that certain tract or parcel of land and all their right, title and interest, both legal and equitable, therein, situate, lying and being in the Counties of Pima and Santa Cruz, in the Territory of Arizona, known as Baca Float No. 3, and granted to the heirs of Luis Maria Baca, by the United States, by the Act of Congress approved June 21, 1860, and afterwards conveyed by the said Baca heirs to John S. Watts by deed bearing date the 1st day of May, 1864, * * * and bounded and described as follows: Commencing at a point one mile and a half from the base of the

> Salero Mountain in a direction North, forty-five degrees East, of the highest point of said mountain, running thence from said beginning point West, twelve miles, thirty-six chains and forty-four links ; thence South twelve miles, thirty-six chains and forty-four links ; thence East twelve miles, thirty-six chains and forty-four links ; thence North twelve miles, thirty-six chains and forty-four links to the place of beginning * * * and said tract of land being known as Baca Float No. 3."

Upon the foregoing facts it is the contention of the appellees, Cornelius C. Watts and Dabney C. T. Davis, Jr., that, at the commencement of this suit, June 23, 1914, they were and that they now are the owners in fee simple absolute of the south half of the tract of land described in the foregoing paragraph and that they are entitled to have the clouds created on their said title by the several conveyances and transactions now to be stated removed and their title to said land quieted ; and it was to do this that this suit was instituted.

## As to the Appellant, Santa Cruz Development Company.

Long subsequent to the deed from John S. Watts to Christopher E. Hawley (rec., p. 193) under which the appellees, Watts and Davis, derive title and on February 3, 1913 (rec., p. 412), the heirs of John S. Watts executed a deed to James W. Vroom purporting to convey the property particularly described in the next but one preceding paragraph ; and it is under this conveyance to Vroom that the appellant Santa Cruz Development Company claims.

**As to the Appellants, Joseph E. Wise, Lucia J. Wise, M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt.**

Subsequent to the deed from John S. Watts to Christopher E. Hawley (rec., p. 193), under which the appellees Watts and Davis derive title, and subsequent to all the deeds from the heirs of Luis Maria Baca to John S. Watts (rec., pp. 154, 197), and on January 14, 1878 (rec., pp. 261, 267), certain persons named Baca executed two papers purporting to remise, release and quitclaim to David W. Bouldin, in consideration of One dollar and "the further consideration as hereinafter expressed," the undivided two-thirds of all their right, title and interest in and to the Las Vegas grant or to the lands granted in lieu thereof, to wit: Locations Nos. 1, 2, 3, 4 and 5, describing location No. 3 by the courses and distances of the 1863 location; and in the same paper the said David W. Bouldin expressly agreed "in further consideration of the conveyance," at his own cost, to use his best efforts to perfect the title to the several tracts described in the paper, and he was given power as agent and attorney "to take possession," to collect any rent that might be due for use and occupation and to lease or sell and to execute all necessary papers.

Subsequent to the deed from John S. Watts to Christopher E. Hawley (rec., p. 193) under which the appellees, Watts and Davis, derive title, and on September 30, 1884 (rec., pp. 272, 282) the heirs of John S. Watts executed a paper purporting to convey by quitclaim to David W. Bouldin, in consideration of one dollar and "the further considerations, covenants and agreements to be performed by the party of the second part, as hereinafter mentioned, and for the purpose of compromising and settling the claims of title between the parties of the first and second part, and of perfecting and quieting the title

to the lands hereinafter described," the undivided two-thirds of the grantors' right, title and interest in and to several tracts of land including the tract involved in this suit, which is described by the courses and distances of the 1863 location, and in the same paper the said David. W. Bouldin expressly agreed, at his own cost, to use his best offorts and do whatever was necessary to perfect the title to said lands, and that " upon the final and complete settlement of the titles to said lands, and all matters connected therewith ", the grantors were to own and possess in fee an undivided one-third of any lands and money or other property that might be recovered ; and the said Bouldin was given power as agent and attorney to take possession, to collect the rents for any use or occupation that might be due, to compromise, mortgage, lease or sell said lands or any part thereof and to execute all necessary papers.

On February 21, 1885 (rec., p. 312), in consideration of two thousand dollars cash and a note for two thousand dollars payable on September 1, 1885, and " the further consideration and covenants and agreements to be performed by the parties of the second part hereinafter mentioned, in confirming and quieting title to the lands " David W. Bouldin conveyed to John Ireland and Wilbur H. King an undivided one-third of one-third of all the right, title and interest owned, controlled and possessed " by said Bouldin in the tract of land involved in this suit, describing it by the courses and distances of the 1863 location.

On November 12, 1892 (rec., p. 216), after reciting that the parties had exchanged deeds conveying each to the other an undivided half interest " in and to a certain tract of land, situate, lying and being in the Santa Rita Mountains in the Territory of Arizona " described by the courses and distances of the 1866 location, " The said tract of land being known as Location Number Three (3) of the Baca Series ", David W. Bouldin, as attorney in fact for his sons, Powhatan W.

Bouldin and James E. Bouldin, under powers of attorney (rec., p. 432), granted, assigned, released and confirmed to John C. Robinson, one-half of the described premises, describing the half conveyed by the courses and distances of the 1866 location and concluding the description " The said tract of land, bounded and described in the sentence immediately foregoing this, being the Southern half of the tract known as Location Number Three (3) of the Baca Series."

On March 13, 1893, a suit was brought in the District Court for the First Judicial District of the then Territory of Arizona (rec., pp. 456–466) by John Ireland and Wilbur H. King against David W. Bouldin and an attachment issued and levied on the tract of land involved in this suit describing it by the courses and distances of the 1863 location. The complaint alleged that the defendant, on March 22, 1888, gave plaintiffs a promissory note for five thousand dollars payable one year after date in consideration of the plaintiffs giving defendant a title bond for one-third of one-third of said tract of land. April 9, 1895 (rec., pp. 500–512) Leo Goldschmidt filed in the Probate Court of Pima County, Arizona, a petition alleging the death in January 1895 of David W. Bouldin leaving property in Pima County and as his heirs P. W. Bouldin and another son, both of age; and on April 20, 1895, on such petition Goldschmidt was appointed administrator. On May 2, 1895 (rec., pp. 468-470) judgment was entered in the action in the District Court reciting the death of defendant, that Goldschmidt had been appointed administrator and become a party to the action, presentation to and rejection by him of the claim and that the case was tried before the court without a jury, and finding all the issues in favor of the plaintiffs and decreeing the sale of the defendant's interest in the land as it existed March 14, 1893. On July 31, 1895 (rec., pp. 472–474), Lyman W. Wakefield, as sheriff of Pima County, sold to Wilbur H. King the interest of the administrator in the land as it existed at

the time of the sale, July 31, 1895, and on January 16, 1899 (rec., p. 515), the said sheriff executed a deed to King of the interest sold. While the case at bar was pending in the United States District Court for Arizona, and on September 30, 1914, the appellant Joseph E. Wise made an *ex parte* application (rec., pp. 480–534) to the Superior Court of the State of Arizona for the County of Pima as the successor of the District Court for the First Judicial District of the Territory of Arizona, and procured a decree directing John Nelson, then sheriff of Pima County, to execute a deed to said Wise conveying " all the right, title and interest which said David W. Bouldin had on said 14th day of March, 1893, in and to Baca Float No. 3, now situate in the County of Santa Cruz, State of Arizona."

On February 7, 1894 (rec., p. 229) Powhatan W. Bouldin and his wife and James E. Bouldin, after reciting the conveyance by David W. Bouldin as attorney in fact for them to John C. Robinson of " the lower or southern one-half of a tract of land known as Location No. 3 of the Baca Series in the Santa Rita Mountains," conveyed to Alex. F. Mathews that certain tract of land situated in Pima County in Arizona Territory which is " the southern one half of the tract of land known as Baca Float No. 3," describing it by the courses and distances of the 1866 location.

On February 7, 1894 (rec., p. 219) John Ireland and Wilbur H. King conveyed to Alex. F. Mathews " all of their rights, title and interest, under and by virtue of a deed executed to them by David W. Bouldin, Sr., dated February 21st, 1885 * * * in and to * * * the southern one-half of the tract of land known as Baca Float No. 3," describing it by the courses and distances of the 1866 location.

On April 8, 1907 (rec., p. 323) Mrs. A. M. Ireland, widow of John Ireland, conveyed to Joseph E. Wise " all the right, title, interest, claim and demand which the said party of the first part has in and to the following described real estate and

property situated in the County of Santa Cruz and Territory of Arizona, to-wit: That certain private land claim known as and called 'Baca Float or Location No. 3'", describing it by the courses and distances of the 1863 location.

On April 24, 1907, (rec., p. 320) Wilbur H. King conveyed to Joseph E. Wise by the same description as in the deed from Mrs. Ireland to Wise before quoted and adding "And also all the right, title, interest acquired by said Wilbur H. King under and by virtue of a certain Sheriff's Sale by the Sheriff of Pima County, Arizona Territory, under a judgment rendered on May 2d, 1895, by the District Court of the First Judicial District of the Territory of Arizona in and for Pima County in favor of John Ireland and Wilbur H. King and against Leo Goldschmidt, Administrator of the Estate of David W. Bouldin, deceased.

In the foregoing statement of facts no mention has been made of the various deeds under which the appellant, Joseph E. Wise, and the appellee, Margaret W. Wise, claim to have succeeded to the title of Antonio Baca, the alleged nineteenth heir of Luis Maria Baca, who it is claimed did not join and was not represented in the deeds from the heirs of Luis Maria Baca to John S. Watts, for the reason that they are discussed in a separate joint brief filed on behalf of the several parties appealing from the portion of the decree as to the said Antonio, and also for the reason that this brief is presented on behalf of the appellees, Watts and Davis, alone in support of their claim to have succeeded to the title of John S. Watts.

Having conveyed their interest by the deeds of May 1, 1864, and May 30, 1871, the heirs of Baca had nothing to convey when the instruments of January 14, 1878, to Bouldin were executed. Similarly since John S. Watts had conveyed his interest to Hawley January 8, 1870, his heirs had nothing to convey when they executed the instruments to Bouldin on September 30, 1884. Consequently Bouldin conveyed nothing to Ireland and King by the deed of February 21, 1885; and

whatever interest David W. Bouldin acquired afterwards from Robinson he conveyed to his sons Powhatan W. Bouldin and James E. Bouldin by the deed of October 16, 1888. Whatever interest the sons acquired in the south half of Baca Float No. 3 was conveyed to John C. Robinson November 12, 1892, so that on March 13, 1893, when the Ireland-King suit was brought and the attempted attachment levied, David W. Bouldin had no interest to attach. Certainly nothing was conveyed by the sheriff under the sale of the administrator's interest as of July 31, 1895, under which Wise claims ; even, if the *ex-parte* proceedings pending the suit be considered.

John S. Watts having conveyed the property to Christopher E. Hawley by the deed of January 8, 1870, his heirs could not and did not convey anything to James W. Vroom by the deed of February 3, 1913, under which the Santa Cruz Development Company claims.

## POINTS.

### I.

### The United States District Court for the District of Arizona had jurisdiction of the case.

In *Lane v. Watts*, 234 U. S., 525, the Supreme Court held that the title to the 1863 location passed to the heirs of Baca and out of the United States April 9, 1864, but that the survey was essential, as said in Stoneroad v. Stoneroad (158 U. S., 240, 247), to segregate the land from the public domain and finally fix the rights of the owners of the grant.

When the suit was filed the appellees, Watts and Davis, had the legal title to the 1863 location and were in possession though possibly not rightfully so technically.

While as a precautionary measure the bill in this case was

not filed until after the decision of the Supreme Court was handed down, the said appellees did not file the bill in reliance upon the decision of the Supreme Court.

The bill was filed to quiet title under the rule which permits the filing of such a bill in a case within the Arizona statute, provided that the facts exist which permit a Federal equity court to take jurisdiction as is claimed to be the case here.

The Arizona Statute, Section 1623 of the Revised Statutes (1913) provides that

> "An action to determine and quiet the title to real property may be brought by anyone having or claiming an interest therein, whether in or out of possession, against any person * * * when such person * * * claims any estate or interest adverse to the party bringing the suit, in or to the real estate, the title to which is to be determined or quieted by the action brought."

The scope of this statute has been passed upon in this jurisdiction in the following cases:

*Ely v. N. M. & A. Ry. Co.*, 2 Ariz., 420; Reversed, 129 U. S., 291.
*Bishop v. Perrin*, 4 Ariz., 190.
*Jordan v. Duke*, 6 Ariz., 455.
*Oliver v. Dougherty*, 8 Ariz., 65.

It is also very similar to the Nebraska statute which was considered in *Holland v. Challen*, 110 U. S., 15; the Iowa statute which was considered in *Whitehead v. Shattuck*, 138 U. S., 146, and in *Wehrman v. Conklin*, 155 U. S., 314; and the Statute of Utah, which was considered in *Lawson v. U. S. Mining Co.*, 207 U. S., 1.

The rule to be deduced from these cases is that if the facts exist which give a Federal equity court jurisdiction, that is, that plaintiff has no adequate remedy at law, the state

statutes will be treated as "an enlargement of equitable rights * * * although presented in the form of a remedial proceeding" (*Lawson v. U. S. Mining Co., supra*, p. 9).

In *Lawson v. U. S. Mining Co., supra*, the Court quoted with approval *Holland v. Challen, supra*, in which it was held that a suit in which the provisions of the Nebraska statute would be applied, might be brought by one out of possession against another, also out of possession. In the *Lawson case*, both parties were in possession and consequently the plaintiff could not bring ejectment proceedings and therefore had no adequate remedy at law, which was the criterion which determined the jurisdiction of the Federal equity court.

In other words, in an action to quiet title under state laws, similar to that of Arizona, it must affirmatively appear from the bill either that both plaintiff and defendant are out of possession, or that the plaintiff is in possession, when it is immaterial whether the defendant is in or out of possession (*Stockton v. Oregon Short Line R. Co.*, 170 F., 627, 629).

*Foster* in his *Federal Practice*, 5th Ed., v. 1, p. 343, says:

> "SECTION 82. State laws creating new rights are enforced by the Federal Courts either at law or in equity
> * * * * * * *
>
> A Federal Court of Equity will follow a State Statute authorizing a person in possession of land and unmolested (*Clark v. Smith*, 13 Pet., 195; *U. S. Min. Co. v. Lawson*, 134 F., 769, aff'd 207 U. S., 1; *N. C. Min. Co. v. Westfeldt*, 151 F., 290; *Kraus v. Congdon*, 161 F., 18); or even one out of possession of vacant land (*Holland v. Challen*, 110 U. S., 15; *S. P. R. Co. v. Stanley*, 49 F., 263; *Field v. Barber Asphalt Co.*, 117 F., 925; *Smith Oyster Co. v. Darbie, etc.*, 149 F., 555; *Frost v. Spitley*, 121 U. S., 557), to maintain a bill to determine in equity title to the same or to recover possession thereof; but not a state statute authorizing one out of possession of land without a trial by jury to obtain possession of the same when occupied by an adverse claimant (*Whitehead v. Shattuck*, 138 U. S., 146;

*Wehman v. Conklin*, 155 U. S., 314, 325; *Gibson v. Cook*, 124 F., 986; *Union P. Co. v. Cunningham*, 173 F., 90) ".

See also :

*Am. Ass'n v. Williams*, 166 F., 17.
*Woods v. Woods*, 184 F., 159.
*Klenk v. Byrne*, 143 F., 1008.
*N. Y., N. H. & H. R. Co.*, 188 F., 10.

In a note to the foregoing section the author says :

> " It is held that a bill is demurrable when it fails to allege affirmatively either that the plaintiff is in possession of the land or that both plaintiff and defendant are out of possession."

citing *L. P. R. Co. v. Goodrich*, 57 F., 879.

The last case is cited approvingly in

*Blythe v. Hinckley*, 84 F., 234 ; 92 F., 239 ;
*U. S. Min. Co. v. Lawson*, 115 F., 1008 ;
*Johnson v. Carson Gold Min. Co.*, 157 F., 154 ;
*Buchanan Co. v. Adkins*, 175 Fed., 701 ; and

In *Baum v. Longwe*, 200 F., 451 (D. C. N. Mex., Oct. 23, 1912, POPE, D. J.), the reason of the holding in these cases is that the Federal Courts have no jurisdiction in equity if there exists an adequate remedy at law and no state can confer such jurisdiction.

See also

*Graves v. Ashburn*, 215 U. S., 331, 334.
*Simmons Case Co. v. Doran*, 142 U. S., 417, 449.
*Reynolds v. Crawfordsville Bk.*, 112 U. S., 405, 410.
*Sayer v. Burkhardt*, 85 F., 246; Cert'd. 172 U. S., 649.
*Cooke v. Copenhauer*, 126 F., 145.
*Morse v. Smith*, 80 F., 206.
*Morrison v. Marker*, 94 F., 697.
*Rummer v. Butler Co.*, 93 F., 304.

A court of equity has an inherent power to remove a cloud on title (*Shelton v. Morrell*, 134 S. W., 988) and this independ-

ent of the state statute which merely enlarges the powers of the equity court (*Siedschlag v. Griffon*, 112 N. W., 18; *Hodgskin v. Boswell*, 110 Pac., 487; *King Lbr. Co. v. Sprague*, 58 So., 920); but primarily such an action comes within the general equity jurisdiction (*Van Houten v. Van Houten*, 68 N. J. Eq., 358; 59 Atl., 555).

In the latter case the complainant had paid the whole consideration and plaintiff had executed a deed to certain land reserving a life estate to himself. About twelve years afterwards he sued to have the deed set aside on the ground that provision for revocation had been omitted. It was held that the suit was under the general equity jurisdiction and not under the statute to quiet title.

In *Chicago Term. R. R. Co. v. Barrett*, 252 Ill., 86, 94; 96 N. E., 794, it was held that a bill to quiet title is entertained in equity because a party is not in a position to force the holder of property, or one claiming adverse title, into a court of law to test its validity.

The following cases support the right to maintain a suit to quiet title under a State Statute in the Federal Court:

*Johnson v. Kramer*, 203 F., 733, 741.
*Smith Oyster Co. v. Darber*, 149 F., 555.
*U. S. v. Leslie*, 167 F., 670.

And it has been held to be "only necessary that the plaintiff should have some kind of estate in the property in controversy, legal or equitable, and that his title should be paramount to that of the defendant (*Wilson v. Bombeck*, 134 Pac., 382, 386 [Sup. Ct. Okla., 7/22/13], citing numerous Kansas cases); that a purchaser at an execution or judicial sale may bring such suit (*Copper Bell M. Co. v. Gleason*, 14 Ariz., 548, 552; 134 Pac., 285).

The statutes providing for actions to quiet title held to be enabling ones, and to be liberally construed (4 *Pom. Eq.*, sec. 1397; Armour v. Frey, 161 S. W., 829, 837).

Having acquired jurisdiction, equity will retain control to dispose of all the questions between the parties affecting this land.

*Miller v. Edison El. Illuminating Co.*, 184 N. Y., 17.

*Cooper & Evans Co. v. Manhattan Bridge Three Cent Line*, 164 App. Div., 64.

*Robbins v. Clock*, 59 Misc., 289 (Aff'd without opinion, 131 App. Div., 917; aff'd without opinion, 203 N. Y., 603).

In *Reich v. Cochran*, 213 N. Y., 416, the Court said (p. 423):

> "In my view of the case enough has been said to demonstrate that the plaintiff is rightfully in equity. If so, the court undoubtedly has jurisdiction to make a complete determination of the matters in controversy between the parties."

Prior to and at the commencement of this suit the appellees, Cornelius C. Watts and Dabney C. T. Davis, Jr., were in possession of the land the title to which it is sought to have quieted in them and from which it is sought to have the clouds removed (rec., 231).

## II.

## The deed, dated January 8, 1870, from John S. Watts to Christopher E. Hawley conveyed the land involved in this suit.

The decision in this case turns on whether the deed from Watts to Hawley (rec., p. 193) conveyed the land selected and located on June 17, 1863, which is described in paragraph 2 of the bill of complaint (rec., p. 4), and which is known in this case as the 1863 location.

No question is made that all the heirs of Luis Maria Baca joined in either the deed of May 1, 1864 (rec., p. 154), or in that of May 30, 1871 (rec., p. 197), if Antonio be left out of consideration, which is done in this brief, since his claims are discussed in a separate brief; and the United States Supreme Court has decided in *Watts v. Lane*, 234 U. S., 525; s. c., 235 U. S., 17, that the title to the 1863 location vested in the heirs of Baca on April 9, 1864.

If the deed to Hawley conveyed this land and the deed of May 30, 1871, inured to his benefit, then the various grantors in the conveyances under which the appellants, Joseph E. Wise and Lucia J. Wise, and the Santa Cruz Development Company, claim had at the time of the several conveyances nothing to convey; and the attachment proceedings were void.

The deed to Hawley (rec., p. 193) reads as follows:

> " do remise, release and quitclaim unto the said party of the second part (Hawley) and to his heirs and assigns forever, All that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part (Watts) by deed dated on the 1st day of May A. D., 1864, Bounded and described as follows: Beginning at a point three miles West by South from the building known as the Hacienda de Santa Rita, running thence north twelve miles, thirty-six chains and forty-four links; running thence East twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence west twelve miles, thirty-six chains and forty-four links to the point or place of beginning: The said tract of land being known as Location No. 3 of the Baca Series.

> Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises and every part and parcel thereof, with the appurtenances; To have and to hold all and singular the above mentioned and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever."

It is contended on behalf of appellants that the property conveyed by said deed is that described by the courses and distances of the 1866 location which would include only a small portion of the 1863 location to which this suit relates. On behalf of the appellees, Watts and Davis, it is contended that the intention of the parties was to convey and the deed did convey the land granted by the United States to the heirs of Luis Maria Baca and by the said heirs conveyed to John S. Watts, that is the 1863 location to which this suit relates.

There is no attempt here to reform or correct the said deed but to have the Court find, as a preliminary to quieting the title to said land in appellees, Watts and Davis, that, under the existing facts known to both parties, the relations of the parties to each other and to the subject matter, the circumstances under which said deed was executed, and the subsequent conduct of the parties, the parties intended to and did convey the land described in the second paragraph of the bill, just as in the case of *Watts v. Lane*, *supra*, the United States Supreme Court found, as a preliminary to decreeing that the land department had lost jurisdiction over this land, that the title passed out of the United States and to the heirs of Baca and yet held that it was not trying title to land.

It is a primary canon of interpretation that the intention of the parties controls, if to do so violates no rule of law.

*Reeds v. Proprietors of Locks & Canals*, 8 How., 274.
*Newson v. Pryor*, 7 Wheat., 7, 10.
*Holmes v. Trout*, 7 Pet., 171.
*St. Louis v. Rutz*, 138 U. S., 226, 243.
*St. Clair Co. v. Lovingston*, 23 Wall., 46.
*Meredith v. Picket*, 9 Wheat., 573.
*McKey v. Hyde*, 134 U. S., 84, 95.
*Morris v. United States*, 174 U. S., 196, 246.
*Reloj Cattle Co. v. United States*, 184 U. S., 624, 637.
*Ainsa v. United States*, 161 U. S., 208.
*Ely v. United States*, 171 U. S., 220.
*United States v. Maish*, 171 U. S., 242.
*Perrin v. United States*, 171 U. S., 292.

In *Cavazos v. Trevino*, 6 Wall., 773, the court held that in construing a grant the circumstances attendant at the time it was made are competent evidence for the purpose of placing the court in the same situation and giving it the same advantage for construing the papers which were possessed by the actors themselves.

In *Hollingsworth v. Fry*, 4 Dall., 345, the court says (p. 347):

> "The great rule of interpretation with respect to deeds and contracts is to put such a construction upon them as will effectuate the intention of the parties if such intention be consistent with the principles of law."

In United States v. Gibbons, 109 U. S., 200, the court says:

> "Where the language is susceptible of two meanings the court will infer the intention of the parties and their relative rights and obligations from the circumstances attending the transaction."

In Rock Island Railway v. Rio Grande Railroad, 143 U. S., 596, the court says (p. 609):

> "In the interpretation of any particular clause of a contract the court is not only at liberty but required to examine the entire contract and may also consider the relations of the parties, their connection with the subject matter and the circumstances in which it was signed."

In Vance v. Anderson, 113 Cal., 532, 45 Pac., 816, the court says (p. 538):

> "Equity * * * shapes its relief in such a way as to carry out the true intent of the parties to the agreement; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, and their relation to one another and to the subject matter are subjects for consideration." Citing *Campbell v. Freeman*, 99 Cal., 34 Pac., 113; *Peirce v. Robinson*, 13 Cal., 116; *Locke v. Moulton*, 96 Cal., 21, 30 Pac., 957; *Ross v. Bruisse*, 64 Cal., 245, 30 Pac., 811; *Taylor v. McLain*, 64 Cal., 513, 2 Pac., 399.

In *Sadler v. Taylor*, 38 S. E., 583, the court says (p. 590):

> "In ascertaining what the intention of the parties was at the inception of the transaction it is proper to consider the parole declarations of the parties and the evidence of other witnesses together with the situation, circumstances and conduct of the parties respecting such transaction prior to, at the time of and after the execution of the deed."

Wherever possible the real intention of the parties is to be gathered from the whole description including the general description as well as the particular description.

Devlin on Deeds, 3d Ed., v. 2, sec. 1039.
*Brunswick Sav. Inst. v. Crossman*, 76 Me., 577, 580.
*Sumner v. Hill*, 47 So., 565, 567.
*Stevenson v. Yoho*, 59 S. E., 954, 956.
*Adams v. Atkinson*, 20 W. Va., 480.

The intention is the controlling element in the construction of a deed.

*Tiernan v. Jackson*, 5 Pet., 580.
*Stanley v. Colt*, 5 Wall., 119, 166.
*Calhoun Co. v. Am. Emigrant Co.*, 93 U. S., 124.
*Pawlet v. Clark*, 9 Cr., 292, 330.
*Brown v. Jackson*, 3 Wh., 449.
*Reed v. Props. Locks & Canal*, 8 How., 274, 288.
*Steinbach v. Stewart*, 11 Wall., 566.
*Phila., etc., R. Co. v. Howard*, 13 How., 307.
*Irvin v. United States*, 16 How., 513.
*Williams v. Paine*, 169 U. S., 55, 76.
*Hughes v. Edwards*, 9 Wh., 489, 494.
*Hollingsworth v. Fry*, 4 Dall., 345.
*United States v. Arredondo*, 6 Pet., 691, 740.

Other cases supporting the same principles are :

*Mauson v. Bullus*, 16 Pet., 528, 533.
*United States v. Peck*, 102 U. S., 64, 65.
*Atkinson v. Cummins*, 9 How., 479, 486.
*Good v. Martin*, 95 U. S., 90, 95.
*Burdell v. Denig*, 92 U. S., 716, 722.
*Roy v. Simpson*, 22 How., 341, 350.
*The Confederate Note Case*, 19 Wall., 548, 549.
*Bell v. Bruen*, 1 How., 169.
*Montana Min. Co. v. St. Louis Min. Co.*, 204 U. S., 204, 214.
*Mobile, etc., R. Co. v. Jurey*, 111 U. S., 584.
*Merriam v. United States*, 107 U. S., 437, 441.
*Canal Co. v. Hill*, 15 Wall., 94.
*United States v. Granite Co.*, 105 U. S., 35, 39.

Under the foregoing principles, what were the surrounding circumstances of the making of the deed by Watts to Hawley which the Court below was to consider in ascertaining the intention of the parties ?

John S. Watts was an intimate of Tomas Cabeza de Baca the grandson of Luis Maria Baca and for a long while the agent of the heirs of said Baca in connection with a number

of the grants to him from the Mexican government and made his home at the house of said Tomas (rec., pp. 351, 353). The said Tomas employed Watts to perfect the title of said heirs and furnished the information on which Watts acted (rec., p. 375). Watts presented the petition for the confirmance of the Las Vegas grant on behalf of said heirs to the surveyor general of New Mexico under the Act of July 22, 1854 (rec., p. 403); conducted the proceedings in which said heirs waived their claim to the Las Vegas grant in consideration of a grant by Congress of a like amount of public land elsewhere and as a result of which the Act of June 21, 1860, was passed authorizing said heirs to select and locate in lieu of the Las Vegas grant an equal quantity of vacant land, not mineral, in the Territory of New Mexico, in square bodies not exceeding five in number (rec., pp. 403–409).

Here is where the use of the word "Float" to designate the property arose. To those dealing with the public lands the term "Float" is a familiar one. It is a term applied to a grant of land by the government, the particular tract of land itself not having been yet determined, that is, a general grant of a certain amount of lands to be selected by the grantee, and attaches to no specific tract until the selection is actually made "in the manner prescribed by law," which in this case included notice to the surveyor general of the selection and location describing it by reference to natural objects, the approval of the surveyor general and by the Commissioner of the General Land Office and finally in order to segregate the land from the public domain the survey by authority of the land department and the approval and filing of such survey (*Watts v. Lane*, 235 U. S., 525, 541; *Stoneroad v. Stoneroad*, 158 U. S., 247). The number "*three*" was added by the land office because it was the *third* of the *five locations* to be selected.

*Nelson v. N. P. R. R. Co.*, 188 U. S., 108;
*Wisconsin Central R. Co. v. Price Co.*, 133 U. S., 496;

*United States v. McLaughlin*, 127 U. S., 428;
*Grinnell v. Railroad Co.*, 103 U. S., 739;
*Railway Co. v. Railroad Co.*, 112 U. S., 414;
*Railroad Co. v. Herring*, 110 U. S., 27;
*Elling v. Thexton*, 7 Mont., 330, 339; 16 Pac., 931, 934;
*Corvallis & E. R. Co. v. Benson*, 61 Ore., 359; 121 Pac., 418, 425;
*Words & Phrases*, v. 3, p. 2850.

The said John S. Watts represented New Mexico in Congress as a delegate and was judge of the Supreme Court of the Territory (rec., p. 297). He undoubtedly prepared the deeds from the heirs of Baca to himself. He knew that no survey had been made of the land and that until a survey had been made by proper authority Baca Float No. 3 was tied to no particular tract of land. On March 2, 1863, he had made a title bond to William Wrightson wherein he stated that he was the owner of one of the unlocated floats, that he had full authority to make the location of said float for the Baca heirs and to cause to be made a title in fee simple for the same and whereby he sold for a valuable consideration to Wrightson the unlocated float and bound himself, "his heirs, executors, administrators and assigns to make a full and complete title to said Wrightson, his assigns or legal representatives whenever thereunto required" (rec., p. 183).

When this bond was offered in evidence the Santa Cruz Development Company and Joseph E. Wise and Lucia J. Wise objected to its introduction on the grounds (1) that the execution thereof by John S. Watts had not been proved; (2) that it was not acknowledged in due form or before a recognized officer; (3) that there is nothing in the paper to connect it with the 1863 location of Baca Float No. 3; (4) that there is no allegation in the bill of the assignment of the bond; (5) that the assignment is of a beneficial power in trust, and, not having been exercised by Wrightson but by

Watts, did not inure to Wrightson or his assigns ; (6) that it could not be used to assist in the construction of a deed, made even in pursuance of the contract, unless the action was to reform the deed ; and (7) that it tended to alter, vary or modify the deed (rec., p. 185).

It was received subject to the objections and later a motion to strike it out was overruled (rec., pp. 186, 455).

Samuel A. M. Syme testified that the bond was among the papers received from James Eldredge and had been in his (Syme's) possession, or in that of Alex. F. Mathews, for many years when he turned it over to the appellees Watts and Davis at the time they acquired the property (rec., p. 187).

Christopher E. Hawley, by James Eldredge as his attorney in fact, conveyed to John C. Robinson, from whom Mathews and Syme acquired title, so that presumably the title bond had been in Hawley's possession, since, as said by the Court in *Lynch, Adm'r, v. Johnson*, 12 Ky., 98, at page 105 :

> " As to the bonds on the proprietors, it is evident that they were delivered by Johnson to them since most, if not all of them, are filed in the cause."

The fact that this title bond is found among the title papers passed along by the several grantors from Hawley to the appellees Watts and Davis, raises a like presumption.

A title bond may be assigned by delivery as well as by a written assignment.

In *Bullion v. Campbell*, 27 Tex., 653, the Court said (p. 656) :

> " The contract upon which the suit was brought was not in writing (referring to the title bond). * * * The assignment of the bond which was in parol was not the contract which it could properly be said they were seeking to enforce and must be regarded in view of the facts in this case as merely the transfer to Campbell and Strong of the obligation or contract between

> the original parties and not as of itself the contract conveying the land. * * * "

And in *Robinson v. Williams*, 40 Tenn., 539 (3 Head), the Court said (p. 542) :

> " The transfer of a title bond may as well be by simple delivery as by an assignment in writing."
> See *Lynch, Adm'r v. Johnson*, 12 Ky., 98.

By the use of the word " assigns " in the bond John S. Watts evidently contemplated that the bond would be assigned and that he would convey directly to such assignee ; and he in terms bound himself to " make a full and complete title " to such assigns.

This bond found among the title papers in the possession of the appellees, Watts and Davis, tends to show the relations of the parties, their connection with the subject matter and the circumstances under which the deed from Watts to Hawley was executed and taken in connection with the language of the entire description makes it clear that it was the intention of the parties to convey and that the deed did convey the 1863 location. That the bond does not identify which of the *five* floats it referred to is immaterial since no claim is made nor evidence introduced to show that it referred to any of the other four.

Both parties knew that the grant was still a " Float," that no survey had been made by the proper government officials to tie it to a specific tract of land, and that what Watts could convey and what Hawley expected to get was the grant from the United States to the heirs of Luis Maria Baca.

The Court below, therefore, correctly held that (rec. p. ) :

> " The rule to be followed by a court of equity in construing a deed is that the real intent of the parties must be gathered from the whole transaction, including the general as well as the particular description, which

> should be construed so as to give effect to the whole and every part of the instrument. There is no doubt in my mind about what was intended to be conveyed by Mr. Watts, nor is there any doubt in my mind as to what was actually conveyed by the deed of 1870. It is clear to my mind that it was intended to convey and did convey the Baca Float of 1863 as described in the conveyance from the Baca heirs to Watts on May 1st, 1864. I think that the language used indicates that the dominant idea in the mind of the grantor, Watts, when the deed was made was of Baca Float No. 3 of 1863, conveyed to Watts by the Baca heirs in 1864, and not of the particular lines or marks by which it might be described."

In so holding the Court violated no rule of law; but on the contrary followed the rules laid down in the cases where there is a conflict in the description of the property conveyed or two different descriptions, or where a part of the description is erroneous.

The description of the property conveyed is: "All that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains." So far it is consistent with the Court's holding, for Mr. Contzen, who made the government survey in 1905 of the 1863 Location, testified (rec., pp. 382, 383) that a large part of the 1863 location was composed of the spurs and ridges of the Santa Rita Mountains, and that it was generally considered the foothills of the Santa Ritas.

The description continues: "* * * granted to the heirs of Luis Maria Cabeza de Baca by the United States." That certainly applies to the 1863 location.

The description goes on: "and by said heirs conveyed to the party of the first part," that is, John S. Watts, "by deed dated on the 1st day of May, A. D. 1864". That correctly describes the 1863 location.

Then follows the courses and distances of the 1866 location, and the description concludes: "The said tract of land

being known as Location No. 3 of the Baca Series." That describes the 1863 location.

So we have four out of the five elements of the description properly applicable to the 1863 location; and if they were the only elements which the deed contained, there would be no question that the 1863 location was described in and conveyed by the deed and that those elements form a complete description of the 1863 location.

The only element of the description which has not been followed are the courses and distances which are those of the 1866 location to which the grantor, Watts, never had title and which he had no power to convey, and which, except for a small overlapping portion in the northeast corner is an entirely different tract of land from "Location No. 3 of the Baca Series granted by the United States to the heirs of Luis Maria Cabeza de Baca and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May A. D. 1864," which according to the very language of the deed it was the intention of the parties should be conveyed.

Another very persuasive consideration that John S. Watts intended to and did convey the 1863 location to Christopher E. Hawley by the deed of 1870 is that Watts was a skilled and experienced land lawyer and, if he had intended to convey the land within the boundaries indicated by the courses and distances, it would have been a simple matter to confine the description to such courses and distances as would ordinarily be done.

The fact that Watts inserted these other elements indicates very strongly that he intended to and did convey, as the Court found, the 1863 location.

A still further argument in support of the finding of the Court below is that there was but one Baca Float No. 3. It was the third of the five square bodies of land which the sixth section of the Act of June 21, 1860, authorized the heirs of Luis Maria Baca who made claim to the same tract of land

as the town of Las Vegas to select and locate. There is no question of the description referring to two tracts "owned" by the grantor, so that it can not be determined which he meant to convey. There was but one of the five locations authorized by the act of June 21, 1860, known as "No. 3." There was but one tract of land conveyed by the heirs of Baca to Watts as "Location No. 3." The language itself of the deed to Christopher E. Hawley shows that the parties were thinking of those facts and not of the lines and boundaries of any particular tract of land. The deed purports to convey but one tract of land. The description, including the general and the particular descriptions, would include two tracts, one which Watts owned and could convey, and the other which he never owned and could not have conveyed. From the language of the deed, the facts and the circumstances attendant on its execution, it cannot be doubted that what was intended to be conveyed and what was conveyed was the land in question here, which is situated in the Santa Rita mountains, is the only tract complying with the description "granted to the heirs of Baca by the United States," or which such "heirs conveyed to Watts," or which was correctly described as "Location No. 3 of the Baca Series." Consequently the erroneous portion of the description, that is, the courses and distances, were properly rejected since what was left was sufficient to ascertain the application of the deed.

The rules that a particular description generally prevails over a general description, that monuments control courses and distances or metes and bounds, that courses and distances or metes and bounds control a general description, and similar rules, are all merely rules of construction intended to ascertain the true intention of the parties and if this is otherwise ascertained give way to that intention.

In *Green v. Horn*, 207 N. Y., 489, the Court says (p. 499):

> "The rule that monuments control courses and distances is merely a rule of construction to ascertain the

> intention of the parties. If that intention is otherwise manifested it must not be ignored in blind adherence to such a rule (*Brookman v. Kurzman*, 94 N. Y., 272; *Higgenbotham v. Stoddard*, 72 N. Y., 94; *Townsend v. Hayt*, 51 N. Y., 656)."
>
> See, also, *M'Nichol v. Flynn*, 153 N. Y. Supp., 308.

Where in a deed there is more than one description and they conflict, that which is false will be rejected and the deed held to convey that which is correctly described, provided that there remains a sufficient description after rejecting the false.

In *White v. Luning*, 93 U. S., 514, the Court, quoting Greenleaf, says (p. 524):

> "Where the description in a deed is true in part but not true in every particular so much of it as is false is rejected and the instrument will take effect if a sufficient description remains to ascertain its application. Applying this rule to the subject matter in this suit we do not think there is any difficulty in reaching the conclusion that the description is sufficiently certain to pass title to the land."

In *State Savings Bank v. Stewart*, 25 S. E., 543, there were two descriptions of the lands in the deed of March, 1890, either of which contained sufficient particulars to enable the parties to identify the lands described, but when each description is applied to its subject matter it is ascertained that they described not the same but different parcels of land. One description was by metes and bounds and the other by lot and block numbers. The court says (p. 544):

> "Where the deed contains two descriptions of the land equally explicit but repugnant to each other that description which the whole of the deed shows best expresses the intention of the parties must prevail. The court will look into the surrounding facts and will adopt that description if certain and definite which in the cir-

cumstances under which it was made will most effectually carry out the intention of the parties. It is one of the maxims of the law that a false description does not render the deed or other writing inoperative if after rejecting so much of the description as is false there remains sufficient description as to ascertain with legal certainty the subject matter to which the instrument applies."

In *Boardman v. Reed*, 6 Pet. 328, the Court (McLean) says (p. 345) :

> " The entire description in the patent must be and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call which by other calls in the patent clearly appear to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain it is admitted that the grant is void. This however was not the case with the patent under consideration. Its calls are specific and taking them altogether no doubt can exist as to the land appropriated by it. The call for the county may be explained either by showing that it is made through mistake or that under the circumstances which existed at the time of the survey it was not inconsistent with the other calls of the patent. This would not be going behind the patent to establish it for its calls fully identify the land granted; but to explain an ambiguity or doubt which arises from a certain call in the patent. This principle applies under some circumstances to the construction of all written instruments. The meaning of the parties must be ascertained by the tenor of the writing and not by looking at a part of it. * * * "

In *Massie v. Watts*, 6 Cr., 148, The Court (MARSHALL, C. J.) says (p. 165) :

> " They (courts) have also decided that if the location of certain material calls sufficient to support it and

> to describe the land other calls less material and incompatible with the essential calls may be disregarded."

In *Parker v. Kane*, 22 How., 1, the Court (CAMPBELL) says (p. 18):

> "The description of the property conveyed as lots number one and six of the fractional quarter is a complete identification of the land having reference to the official surveys of the United States according to which their sale was made. A more general and less definite description can not control this, but whatever is inconsistent with it will be rejected unless there is something in the deed or local situation of the property or of the possession enjoyed, to modify the application of this rule."

The general description in this case was "being that part of the northeast quarter lying east of the Milwaukee River."

In *Holmes v. Trout*, 7 Pet., 171, the Court says (p. 217):

> "It will be observed that in giving a construction to an entry the intention of the locator is to be chiefly regarded the same as the intention of the parties in giving construction to a contract. If a call be impracticable it is rejected as surplusage on the ground that it was made through mistake." * * *

In *Leonard v. Osburn*, 146 Pac., 530, the description read in part "the land lying in Twin Lake Park in Santa Cruz County described as lot 10 in block 2, subdivision No. 6 as the same is shown on the map of Twin Lake Park made by N. E. Beckwith, etc.," the map being in fact made by E. D. Perry. The Court says (p. 531):

> "A deed is not void for uncertainty because of errors or inconsistency in some particulars of description. Generally speaking a deed will be sustained if it is possible from the whole of the description to ascer-

> tain and identify the land intended to be conveyed. It is not essential to the validity of the deed, says Devlin in his work on real estate, section 1012, that the description shall be by boundaries, courses or distances or by reference to monuments. If the description is general, the particular subject matter to which the description applies may be ascertained by parol evidence. Nor will the deed be void for uncertainty from the fact that the description is in part false or incorrect if there are sufficient particulars given to enable the premises intended to be conveyed to be identified. Devlin on Real Estate, 3d ed., section 1016."

In *Baxter v. Calhoun*, 22 F., 111, the description was " a certain tract of land situated in the Borough of Arnold in the County of Westmoreland and State of Pennsylvania devised to the said George H. Calhoun by his mother, Mrs. M. M. Calhoun, by her will recorded in Westmoreland County in Will Book No. 8, page 126 containing twenty-two acres, more or less ", and the Court says (p. 114) :

> " The general rule is that parol testimony is not permitted to show the subject matter of the grant, but when the description is sufficiently definite to fix its location parol evidence is admissible to supply a particular description. It is clearly established by the authorities * * * that that which was capable of being rendered certain has been rendered indubitably certain by the testimony."

In *Flagg v. Eames*, 40 Vermont, 16, 94 Am. Dec., 363, the court held that repugnant words must yield to the purpose of the grant where such purpose is clearly ascertained.

In *Summer v. Hill*, 47 So., 565, the court held (567) that the description of the property conveyed as " Hancock Place " would prevail over the particular desciption.

In *Brier Hill Collieries v. Gernt*, 175 S. W., 560, the deed described the lands and then added " it being the true intention, purpose and understanding of the parties to this deed that the bargainers * * * hereby convey and assure all their rights, title, claim and interest in and to the properties hereinabove set out as fully as the same is in them and not otherwise," and the court says (p. 561) :

> " All parts of the deed must be construed together without regard to its mere formal divisions * * * thus construed the language which we have italicized explains, qualifies and limits the previous words so as to confine and restrict them to such ' right, title, claim and interest ' only in the lands described as was at the time vested in the vendors."

In *Virginia Iron, Coal & Coke v. Combs*, 177 S. W., 238, the court says (p. 238) :—

> " It is the rule in this state that where the description of the land conveyed is couched in such general terms that it will cover two or more tracts of land the ambiguity is a latent one and parole evidence is admissible to show which of the tracts was meant."

In *Marshall v. Carter*, 85 S. E., 691, the court says (p. 692):—

> " It is well settled that the description of land in a deed is sufficient if it furnishes means by the application of *aliunde* proof of identifying the land."
>
> See also
>
> *State v. Herold*, 85 S. E., 733.
> *Riley v. Foster*, 148 Pac., 246.

In *Cecil v. Gray*, 148 Pac., 935, 936, it is held that " all of Section 30 " or " the undivided half of Section 30 " conveys

the section or half section and is not confined to the particular courses, citing 13 Cyc., 635.

In *East Tenn. Coal Co. v. Taylor*, 173 S. W., 433, the deed was held to convey Grant No. 21,903 though by clerical error it was written 21,902.

In *Moore v. M. & St. P. S. R. Co.*, 152 N. W., 405, it was held that description by lot number prevails where the boundaries are improper.

In *Waterhouse v. Gallup*, 178 S. W., 773, it was held that a deed is not void for uncertainty unless on its face the description cannot by extrinsic evidence be made to apply to any definite land.

In *Burbridge v. Ark. Lumber Co.*, 178 S. W., 304, it was held that in construing a timber deed in case of ambiguity evidence *aliunde* is admissible.

In *Brown v. Foster Lumber Co.*, 178 S. W., 787, it is held that the property may be identified by extrinsic evidence.

Where the two descriptions contained in the deeds are inconsistent the grantee may rely on that most beneficial to him ( *Winter v. White*, 70 N. D., 305 ; *Buckhannon v. Stuart*, 3 H. & J., 327 ; *Merriman v. Blalack*, 121 S. W., 552 ; *Quade v. Pillard*, 112 N. W., 646 ; *Sharp v. Thompson*, 100 Ill., 447 ; *Armstrong v. Nudd*, 49 Ky. [10 B. Mon.], 144 ; *Hall v. Gittings*, 2 H. & J., 112 ; *Colter v. Mann*, 18 Minn., 96) ; that description which accords with the intention of the parties will be adopted and the other rejected as false or mistaken (*Banks v. Hawkins*, 75 Atl., 617 ; *Thompson v. Hill*, 73 S. E., 640 ; *Mylius v. Raines-Andrews Lumber Co.*, 71 S. E., 404 ; *Bender v. Chew*, 129 La., 849) ; that which gives effect to the deed rather than that which defeats the deed will be adopted (*Hall v. Bartlett*, 112 P., 176) ; that applying to the land owned by the grantor rather than that applying to land which he does not own (*Piper v. True*, 36 Cal., 606) ; the deed will be construed as a whole and interpreted in the light of

circumstances (*Hubbard v. Whitehead*, 121 S. W., 69); and finally, the deed will be construed most strongly against the grantor (*Vance v. Fore*, 24 Cal., 345; *Marshall v. Niles*, 8 Conn., 369; *L. E. & W. R. Co. v. Whitham*, 155 Ill., 514; *Holmes v. Howard*, 2 H. & M. H., 57; *Carroll v. Norwood's Heirs*, 5 H. & J., 155; *Carrington v. Goddin*, 13 Gratt., 587).

See, also,

*Wilt v. Cutler*, 38 Mich., 189.
*State v. Rogers*, 36 Mich., 77.
*Anderson v. Bayles*, 7 Mich., 69.
*Ives v. Kimball*, 1 Mich., 313.

## III.

**The deed from John S. Watts to Christopher E. Hawley of January 8, 1870, purported to and did convey the thing itself, Baca Float No. 3, according to the 1863 location and the deed of May 30, 1871, inured to Hawley and his successors in title.**

While the terms used are "remise, release and quit-claim" this is more than a simple or pure quit-claim deed. The granting portion is as follows:

> "has remised, released and quit-claimed, and by these presents do remise, release and quit-claim unto the said party of the second part and to his heirs and assigns forever, all that certain tract, piece or parcel of land situate, lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing One hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the

> party of the first part by a deed dated 1st day of May, A. D. 1864, bounded and described as follows: Beginning at a point three miles west by south from the buildings known as the Hacienda de Santa Rita; running thence North twelve miles, thirty-six chains and forty-four links; running thence East Twelve miles, thirty-six chains and forty-four links; thence South Twelve miles, thirty-six chains and forty-four links; thence West Twelve miles, thirty-six chains and forty-four links to the point or place of beginning: The said tract of land being known as Location No. 3 of the Baca Float Series. * * * And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the above described premises. * * * To have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part his heirs and assigns forever."

The first thing to be observed is that this is not a conveyance of the interest which John S. Watts might have in the property, but it expressly conveys the property itself, and the habendum clause is that Hawley, his heirs and assigns, shall forever hold the property—not the interest of Watts in the property; and, as if to emphasize this fact, there is added the usual description in a quit-claim deed,

> " And also the estate, right, title, interest, property, possession, claim and demand,"

of Watts.

Now, the first thing to be determined, is the effect of this deed. By effect is not meant as to what particular land it conveys, but the effect as a conveyance upon whatever land it does convey.

The effect of such a deed is to convey the thing itself, not whatever interest the grantor may have had in the thing.

This is an important distinction, and the cases express it by saying that if the grantor intended to convey, and the grantee expected to have conveyed to him the thing itself and not merely the interest of the grantor in the thing, then, after-acquired property passes to the grantee, either because the grantor must be held to make good his obligation to convey the thing itself to the grantee, or because he is estopped from claiming an interest in the thing contrary to his grant.

In *Van Rennselar v. Kearney*, 11 How., 297, 325, the Court held that a deed which purports to convey a fee simple title carries after acquired property, saying the "estoppel works upon the estate and binds the after acquired title as between parties and privies." This is followed in *Lindsay v. Freeman*, 83 Tex., 259, 265; 18 S. W., 727.

In *Mosier v. Carter*, 35 L. R. A. (n. s.) 1182, there is an elaborate note which reads in part as follows:

> "When a person competent to act has solemnly made a deed (conveying not merely his interest at the time but a fee simple estate) he should not be allowed to gainsay it to injury of those whom he has misled thereby (Lindsay v. Freeman, 83 Tex., 263; 18 S. W., 727).
>
> * * * * * *
>
> "It follows that the rule of nonestoppel is only applicable to a deed of bargain and sale by release or quit-claim in the strict and proper sense of that species of conveyance. And therefore if the deed bears on its face evidence that the grantor intended to convey and the grantee expected to become invested with an estate of a particular description or quality or that the bargain had proceeded upon that view between the parties then although the deed may not contain any covenants of title in the technical sense of the term still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him in respect to the estate thus described as if a formal conveyance to that effect had been inserted; at

least so far as to estop them from ever afterwards denying that he was seized of that particular estate at the time of the conveyance." Citing a large number of cases.

In *Pond v. Minnesota Iron Co.*, 58 F., 448, an action of ejectment by claimants under a deed conveying specific land against claimants of other land afterwards patented to grantor in first deed, the Court said (p. 451):

> " The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed as well as the situation of the parties and then to give effect to such intention if practicable or not contrary to law (2 Devlin on Deeds, sec. 836). * * * The conclusion seems irresistible that the minds of the parties met; that Peck and the others received what they intended to buy and Roussain delivered what he intended to sell. They never negotiated for or purchased the N. W. ¼ of sec. 33, T. 62, R. 15."

In *W. Seattle L. & I. Co. v. Novelty Mfg. Co.*, 31 Wash., 435, 72 Pac., 69, the Court said (p. 443):

> " The deed in question purports to convey more than the release of the grantor's claim at the time. It conveys the 'land itself.' * * * Held to carry after acquired title.
>
> The petitioner's deed *purports* to be an unqualified grant of the land. It *purports* to pass the whole estate and it is *utterly inconsistent* with the plain import to allow the petitioner to show that only a part of the estate passed by that conveyance."
>
> Heard v. Hall, 16 Pick., 461.

Though a quit-claim deed may not operate as an estoppel when upon its face and by its terms it only purports to release and quit-claim whatever interest in the premises the grantor then has; yet *if in such deed* the grantor either by way of

recital or *otherwise represents himself* as being the owner of the premises such grantor and any one claiming under him by descent or devise or by any subsequent conveyance of the premises, *may be estopped from alleging or proving the contrary.*

*Belletrean v. Jackson*, 11 Wend., 117.
*Jackson v. Waldron*, 13 Wend., 187.
*Chautauqua Co. Bk. v. Risley*, 4 Denio, 486.
*Fithughs Exors. v. Tyler*, 8 B. Monroe, 561.

> " There are many cases to be found in the books from whence we may collect that the Courts have thought that a conveyance *without warranty* will *equally* operate as an estoppel; and that when the ancestor is estopped the heir shall also be estopped."
>
> *Lord Kenyon in Good Title v. Morse*, 3 T. R., 371.

Though a deed contained no covenant but that of non-claim, this was treated as a covenant real which runs with the land and it was decided that a title subsequently acquired by the grantor enured to the grantee.

*Fairbanks v. Williamson*, 7 Maine, 99.

> " Although a deed of bargain and sale, by way of *release* and *quitclaim* purports to convey nothing more than the interest which the grantor *has at the time* still if the deed bears on its face evidence that the grantors *intended* to convey and the grantee *expected* to become invested with an estate of a particular description or quality and that the bargain had proceeded upon that footing between the parties, although it may not contain *any* covenants of title in the technical sense of the term, still the legal operation and effect will be as binding on the grantor and those claiming under him as to this expected estate as if there were a formal covenant so as to estop them from ever afterwards denying that he was seized of *that particular expected estate* at the time of the conveyance."
>
> " And whatever may be the form or nature of the conveyance to pass real property if the seisin or pos-

session of the grantor of a particular estate is affirmed either in *express terms* or *by necessary implication*, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the *estate* and binds *all after acquired* title as between parties and privies."

*Van Renneslaer v. Kearney*, 17 How., 297, 325.
*Herman's Law of Estoppel*, p. 279, secs. 258, 259, 260, Ed. 1891 & *(n)* 3 citing many decisions.

When the warranty is not general but is limited to any title to be derived from or under the grantor it has the same effect to create an estoppel that it would have had if it had been with general warranty.

*Kimball v. Blaisdetl*, 5 N. H., 535.

A deed which estops a grantor equitably estops all persons in privity, all claiming under and through him, *whether heirs, devisees or subsequent purchasers.*

*Stow v. Wyse*, 7 Conn., 220.
*Hill v. Hill*, 4 Barbour, 430.
*Douglass v. Scott*, 5 Ohio, 198.
See, *Rawle on Covenants*, Ch. 9, pp. 404, 410, 2nd Ed.

## What is not an "After-Acquired" Interest?

If a person has paid for a tract of land and is *entitled* to but has not gotten a good deed therefor, and in this condition of things conveys the land to a grantee by deed, with special warranty or of remise and release, and then after this the grantor receives a deed for the land, this is not in legal contemplation an "after-acquired" interest, and the grantor and those claiming under him are estopped from claiming and asserting such title against such grantee.

*Irvine v. Irvine*, 9 Wall., 625.
*Herman on Estoppel*, Sec. 263 & (*n*) 4.

And in the case under consideration it is abundantly clear, from the title bond of Watts to Wrightson, the deeds to Watts from the Bacas of May 1, 1864 and May 30, 1871, the deed from Watts to Hawley of January 8, 1870, and the contract between Watts and the Baca heirs—that Watts at the date of his deed to Hawley and long prior thereto had paid for this Float No. 3 and was entitled to a good and sufficient deed for the whole tract—and therefore by the deed to him of May 30, 1871, he did not get any "after-acquired" interest or anything which he or his heirs or any one claiming through or under him, could assert and claim against Hawley or those claiming under him.

It will be noted that Watts quitclaimed the land itself, and not his right, title and interest. He passed a title. By Sec. 33 of the *Howell Code of Arizona*, adopted in the Fall of 1864, it is provided :

> "If any person shall convey any real estate purporting to convey the same *in fee simple absolute* and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

This statute remained in force for many years and until after 1871. Watts having conveyed the land itself, even if by quitclaim, any subsequent title would go to his grantee.

There is a later statute in Arizona to the effect that a conveyance shall only pass what the grantor then had, and no more, but this statute was passed after 1877.

It would thus appear that Hawley, by his deed from Watts of 1870, acquired all of the interest Watts ever acquired.

*Bogg v. Shoab*, 13 Mo., 366, 373, and *Cecil v. Gray*, 148 Pac., 935, were decided under similar statute.

The Court below stated very clearly the principle upon which the foregoing point is based in that it said (rec., p. 418) :

> " I think it can not fairly be said that Watts having obtained the deed from the Baca heirs on May 1, 1864, which was executed by nearly all of the heirs in person and by certain of them by other persons purporting to act for certain of the heirs who did not sign, that Watts afterwards conceived the idea of having all of the heirs execute the deed of 1871 to him and thereby convey title to him for his, Watts', benefit, and not for the benefit of his grantee, Hawley. I do not think that there is anything in the testimony to indicate that such was the purpose and intent of Watts at the time he obtained the deed of 1871.
>
> " I am likewise of the opinion that if it be admitted that certain of the Baca heirs did not properly execute the original deed to Watts and thereby convey their respective interests therein and that the people who signed that ancient document were not authorized on behalf of those who did not sign to execute it, that their subsequent ratification of such signature and conveyance in the deed of 1871 to Watts, and that the title thereby acquired by Watts inured to the benefit of Watts' grantee, Hawley."

## Summary.

Two further facts illustrate the correctness of the foregoing conclusion. The deed of May 30, 1871, primarily conveys other tracts of land and the fact that John S. Watts in concluding it incorporated a confirmation of the deed of 1864 to him and his *assigns* and a quitclaim of the land conveyed by that deed shows that he intended to secure for his " assigns " the full title.

The other fact that shows that John S. Watts regarded the deed to Hawley as conveying whatever he had acquired from

the heirs of Baca is that there is no evidence that he ever claimed any interest in the 1863 location after the conveyance to Hawley though he lived until 1876 and that it was only after his death in 1877 that any claim on behalf of his heirs was made and then it was an attempt to again relocate (rec., p. 179).

## IV.

**The several deeds subsequent to the deed from Watts to Hawley under which Watts and Davis claim contain substantially the same description as the deed to Hawley, and were intended to and did convey the 1863 location.**

In the deed dated May 1, 1884 from Christopher E. Hawley by James Eldredge his attorney to John C. Robinson, the description of the property is identical with that in the Hawley deed and has the additional element that the property conveyed is described as being that "by said Watts conveyed to the said Christopher E. Hawley by deed dated on the 8th day of January 1870."

In the deed dated December 1, 1892 from John C. Robinson to John W. Cameron the property is identified as "the same being the southern half of the tract of land known as Baca Float No. 3."

In the several deeds dated September 22, 1893, from John C. Robinson, John W. Cameron and Mrs. A. T. Belknap, James Eldredge and Charles A. Eldredge to Alexander F. Mathews, and in the deed dated September 25, 1893 from John W. Cameron to Alexander F. Mathews the property is described as "the southern half of the tract of land known as Baca Float No. 3."

In the deed dated February 8, 1907, from the heirs and executors of Alexander F. Mathews to Watts and Davis the property is accurately described as Baca Float No. 3 granted to the Heirs of Luis Maria Baca by the United States and conveyed by them to Watts by the courses and distances of the 1863 location.

When these deeds are read in the light of the surrounding circumstances and the facts attending their execution, the Court below properly held them to convey the 1863 location under the authorities cited under the foregoing points in this brief.

In this connection the Court below very properly, and in thorough accord with the principles laid down in the cases cited, said (rec., p. 417):

> " To enable me to interpret the language used in the conveyances " (referring to the foregoing conveyances and the Hawley deed) " and especially in the conveyance from Watts to Hawley, I have considered the evidence and the circumstances under which the deed was executed and also the testimony introduced by the defendants showing the subsequent acts, conduct and declarations of the parties. The rule to be followed by a Court of Equity in construing a deed is that the real intent of the parties must be gathered from the whole transaction including the general as well as the particular description which should be construed so as to give effect to the whole and every part of the instrument."

## V.

**The various instruments and proceedings under which the several defendants below other than the Bouldins claim, constitute clouds upon the title of Watts and Davis.**

*A Cloud on Title.*

The definition is defined to be :

> " A semblance of title, either legal or equitable which if valid would affect or encumber the title, but which cannot be shown except by extrinsic evidence to be invalid."
>
> *Glos v. People*, 259 Ill., 332, 342; 109 N. E., 763.
> *Allott v. Am. S. Co.*, 237 Ill., 55; 86 N. E., 685.
> *Parker v. Miller-Brent L. Co.*, 47 So., 580.

But see

*Arthur v. Griffith*, 61 S. E., 519.

The following cases support the proposition that to constitute a cloud it is necessary that extrinsic evidence must be required to show the invalidity or other ground why the title is not affected.

*Graves v. Ashburn*, 215 U. S., 331.
*Johnson v. Cramer*, 203 F., 733, 742.
*Ogden Co. Armstrong*, 168 U. S., 224. 238.
*Rich v. Braxton*, 158 U. S., 375.
*Accord v. West Poc., Corp'n* (C. C. 156 F., 989, 998, aff'd 174 F., 119).

In *Thompson v. Pinnell*, 237 Mo., 545, 141 S. W., 805, the Court said :

> " The owner of the legal title who is in possession or the owner of an equitable title whether in possession or not, may in either case sue in equity to remove a

cloud on its title to real estate when the deed, instrument, or record creating the cloud is not void on its face, but resort must be had to extrinsic oral testimony."

In *Dooley v. Proctor & Gamble*, 158 A. D., 429; 143 Sup., 650, it is held that unless necessary to prove invalidity by extrinsic evidence there is no cloud; and in *Hawes v. Clarke*, 159 A. D., 65, 144 Sup., 11, it is held that papers which the Register of Deeds is not entitled to record can not create a cloud.

**Ordinarily the Plaintiff Must be in Possession.**

This is held in the following cases:

*Roberts v. N. P. Co.*, 158 U. S., 30.
*Whitehead v. Shattuck*, 138 U. S., 146, 154.
*Golden Cycle N. Co. v. Christmas Gold M. Co.*, 204 F., 939, 123 C. C. A., 261 (C. C. A., 8th Cir. Col., 4/14/13).
*Campbell v. Farmers Mfg. Co.*, 203 F., 571.
*Graves v. Crawford*, 149 F., 968.
*Elliott v. Atlantic City*, 149 F., 849.

*But if, as in our case, there is a special ground of equity jurisdiction, that is, the construction of the Hawley deed, in addition to the ground of the removal of cloud or quieting of title, then possession is not necessary.*

*Fies v. Rosser*, 50 So., 287.
*Rowe v. Allison*, 112 S. W., 395.

In *Butterfield v. Miller*, 105 F., 200, 202 (C. C. A. 8th Cir., 2/13/12), where the question involved was the construction of a deed, it was held that possession was not necessary; so in *Solis v. Williams*, 205 Mass., 350; 91 N. E., 148, where the cancellation and discharge for invalidity of a conveyance of record was sought; in *Snyder v. Wheeler*, 81 Kan., 508;

106 Pac., 462, where cancellation was sought on the ground of existing encumbrances; in *Lewis v. Alston*, 63 So., 1008, where cancellation of a deed on the ground of undue influence; in *King Lbr. Co. v. Sprague*, 58 So., 920, to remove a mortgage on the ground of failure of consideration; and in *Baxter v. Baxter*, 92 N. E., 881, 1039, where the deed was claimed to have been unlawfully and fraudulently obtained.

Possession is not necessary where the primary relief sought is upon another feature of equity jurisdiction.

*Jefferson v. Gregory*, 73 S. E., 452.
*Otey v. Stuart*, 91 Va., 714; 22 S. E., 513.
*Austin v. Minor*, 107 Va., 101; 57 S. E., 609.
*Booth v. Wiley*, 102 Ill., 84, 113, 114.
*Swick v. Resse*, 62 W. Va., 557; 59 S. E., 510, 511.
*Shipman v. Furness*, 69 Ala., 555; 44 Am. Rep., 528, 531.

Nor is possession required if the plaintiff's title is equitable.

(*Kimball v. Baker L. & T. Co.*, 152 Wis., 441, 450.
*Shannon v. Long*, 60 So., 273.
*Mustard v. Big Creek Dev. Co.*, 72 S. E., 1021—in this case there was a title bond.)

Nor is possession required in cases where it is not to be expected, as in the case of uninclosed woodland (*Graves v. Ashburn*, 215 U. S., 331, 334; s. c., 149 F., 988), or unoccupied land (*Warren v. O. & W. R. R. Co.*, 156 F., 203).

Neither is possession necessary where the defendant sets up by answer or cross-bill, or otherwise, affirmative claims and asks affirmative relief.

*Bradtl v. Sharkey*, 113 Pac., 653, 654.
*Siedschlag v. Griffon*, 112 N. W., 18;

and where the plaintiff is "not in possession", the defendant having made his answer a counterclaim and sued to have

his title quieted, the question of title may be settled by the Court.

*Sanders v. Riverwide*, 55 C. C. A., 240.
*Vance v. Gray*, 142 Ky., 267 ; 134 S. W., 181.
*Johnson v. Farris*, 140 Ky., 435 ; 131 S. W., 183.
*Hall v. Hall*, 149 Ky., 817 ; 149 S. W., 112.
*Clark's Heirs v. Boyd*, 152 Ky., 134 ; 153 S. W., 227.

Where the defendant has answered the cross-bill and the bill, he cannot object to the Court making a full determination of all questions.

(Egan v. Mahoney, 24 Col. App., 285.)

### Possession Through Tenant Sufficient.

Where possession is necessary it is sufficient if it be through tenants (*Upchurch v. Sutton Bros.*, 142 Ky., 420 ; 134 S. W., 477, 478 ; *Stewart v. May*, 111 Md., 162 ; 73 Atl., 460).

### That the Possession is Taken for the Purpose of the Suit is not Material.

This is held in *Perry v. McDonold*, 72 S. E., 745 ; *Kraus v. Congdon*, 161 F., 18 ; *Apperson v. Allen*, 42 Mo. App., 537.

In *Stanley v. Topping*, 143 Pac., 632, it was held that the defendant in his suit to determine adverse claims, having denied plaintiff's title cannot claim that the plaintiff was guilty of fraud in securing possession.

### Nature or Character of Possession.

The following cases construe the words "peaceable possession", which is used in the Alabama Statute, and may be examined as to the nature of the possession which is sufficient in this case :

*Vaughan v. Palmore*, 57 So., 488, 490.
*Central of Ga. Ry. Co. v. Rouse*, 57 So., 706.
*G. E. Wood L. Co. v. Williams*, 47 So., 202.

## Against Whom Action May Be Brought.

In *Berry v. Howard*, 146 N. W., 577, it is held that a statutory action to quiet title or remove cloud may be brought against all the world.

See :

*Faxon v. All Persons.*

In view of the foregoing authorities, it seems scarcely necessary to take up separately the several instruments and the proceedings under which the Santa Cruz Development Company, Joseph E. Wise, Lucia J. Wise, M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox and Eldredge I. Hurt severally claim, since a reference to the statement of facts will show that they were executed either by persons whose predecessors in title had already conveyed the property to the predecessors in title of Watts and Davis, or were proceedings against persons who had acquired the alleged interest in the property under the void deeds, or against persons who had divested themselves of whatever interest they had in the property prior to the commencement of the proceedings.

Especially is the attention of the Court called to the deed dated February 7, 1894, from Powhatan W. Bouldin and his wife and James E. Bouldin to Alexander F. Mathews, and from John Ireland and Wilbur H. King to the same, in which the property conveyed is described as the southern half or one-half of the tract of land known as Baca Float No. 3 in connection with the alleged judicial proceedings against David W. Bouldin in which the sale under which Joseph E. Wise claims was made July 31, 1895, of the interest of Bouldin, Administrator, as of date of sale, and also in view of the alleged conveyances, dated April 8, 1907, from Mrs. A. M. Ireland to Joseph E. Wise, and April 24, 1907, from Wilbur H. King to Joseph E. Wise.

It is submitted that the Court below properly found that these instruments and proceedings constituted a cloud upon the title of Watts and Davis, and that the decree quieting the title in Watts and Davis and removing the cloud was proper and should be affirmed.

## POINT VI.

### The right of Watts and Davis to maintain this action is not barred by laches or by any statute of limitations.

As has been previously pointed out, this is an action to quiet title and remove cloud, and in such an action the question of laches and the application of the statute of limitations is governed by the rules peculiarly applicable to this kind of action.

In *Reich v. Cochran*, 213 N. Y., 416, the Court, referring to the case of Miner v. Beekman, 50 N. Y., 507, said (p. 425) :

> " In that case Judge GROVER said, referring to a case where the mortgagor had continued in possession, that the right to maintain the action for the purpose of removing a cloud from title is a continuing right ' that may be asserted at any time during the existence of the cloud ; never barred by the statute of limitations while the cloud continues to exist ' (p. 343)."

In *Shannon v. Long*, 60 So., 273, 275, the Court pointed out the distinction which it is sought to make above, and held that the action was not to forfeit a lease, but that, upon the facts shown, to declare that the lease had been forfeited and that consequently a different question arose as to the application of the rule as to laches.

In *Shelton v. Horrel*, 134 S. W., 988, 999, laches is held to be conduct which induces another to act to his injury, and in *Coates v. Cooper*, 140 N. W., 120, 124 (Minn.), the Court says:

> " In the assertion of adverse claims, laches can be claimed only if the defendant has been injured."

In *Buckman v. Cox*, 59 S. E., 760 (S. C. App., W. Va., 11/26/07), the Court said (p. 762);

> " Laches in legal significance is not delay but delay that works a disadvantage to another. So long as the parties are in the same condition it matters little whether one asserts a right promptly or slowly within the limits allowed by law * * *." Citing 5 Pom., sec. 21, and cases.

In *Lougee v. Wilson*, 131 Pac., 780 (Col.), laches was held not to be applicable to the statutory action.

In *Bradley L. Co. v. Langford*, 160 S. W., 866 (Sup. Ct. Ark. 10/27/13) the lands were forfeited to the State for the non-payment of taxes, but the forfeiture was void. Thereafter, until 1911, the owners paid no taxes, and exercised no control over the land. In 1903 the State conveyed the land, and the subsequent grantee paid taxes for seven years, but had not the seven years possession necessary to adverse possession when suit was brought to cancel the conveyance from the State. *Held* that the former owners were not barred by laches.

In *Parks v. Roth*, 137 Pac., 76–78 (Col. 12/8/13) the plaintiff proves fee simple title to himself from the Government; and it was held in this case that laches were not applicable.

In *Thurston v. Tubbs*, 257 Ill., 465, 100 N. E., 947, 950, it was held that in suits to remove cloud, not to reform, cancel, etc., the limitation applicable to such suit was not analogous to that applied in the case of a subsequent will after the tes-

tator had already deeded the property, if held to be a suit to set aside such will.

In *Coates v. Cooper, supra*, it is held that an action to remove cloud is not such an action as the statute applied to. In *Scholle v. Finnell*, 137 Pac., 241, 243, the Court said:

> "The principal danger which plaintiff seeks to avert neither is nor can be older than the title which it threatens. In short, the plaintiff's right to bring this action does not antedate the facts in which it had its origin. The plaintiff became owner of the land on the 3d day of October, 1857, when he received the sheriff's deed and he then for the first time had a title to be clouded."
>
> *Foster v. Gray*, 133 Pac., 146.
> *Manson v. Marks*, 52 Cal., 553, 124 Pac., 187.
> *Empire R. & C. Co. v. Mason*, 126 Pac., 1129.

No title by prescription could be acquired until after the segregation of the land from the public domain.

1 Cyc., pp. 1113, 1114, and cases cited.

In this case, therefore, there is no question of laches or the action being barred by the Statute of Limitations.

## POINT VII.

**The question of adverse possession or title by prescription is not in the case.**

Though in the pleadings the defendants Wises set up a claim of title by adverse possession or statutory prescription, when it came to the hearing, their counsel, in response to a question of the Court, stated that he made no claim of adverse possession or adverse possession under color of title, but only

of such possession as would give notice to everyone that the occupant had some kind of claim (rec., p. 390).

In his brief counsel for Joseph E. Wise has a brief point in which he tentatively suggests that Joseph E. Wise and Lucia J. Wise may have some rights by adverse possession, notwithstanding that the land was not segregated from the public domain until December, 1914. It is deemed a sufficient answer to call the court's attention to 1 Cyc., 1113, 1114, and the cases there cited which show that, under the circumstances of the Wises, the cases which hold that a person may hold adversely against all the rest of the world though holding in subordination to the United States. Those cases relate to a person in possession seeking to perfect his title from the United States, the title being afterwards perfected.

## VIII.

### Some Inaccuracies in Appellants' Briefs.

The appellants' briefs were not received until after this brief was in type and too late to answer them beyond merely pointing out certain objections which a casual reading discloses and which are of a general and pervading character in those briefs.

### Brief of Mr. Franklin for Appellants.

Throughout he characterizes the deed from John S. Watts to Christopher E. Hawley, dated January 8, 1870, as a quitclaim deed when what it is is one of the questions in the case. The appellees Watts and Davis claim that it is not a mere quitclaim but purports to convey the land itself not the right, title and interest of Watts in the land.

In the early part of his statement of facts he states that three different tracts of land were selected by John S. Watts as attorney for the heirs of Luis Maria Baca as and for location 3, and the statement is so made as to be misleading when it is considered that much of the argument in the case turns on the question what the parties to conveyances meant when they referred to "Location No. 3 of the Baca series" or "Baca Float No. 3". Mr. Franklin would have been right had he said that Watts first sought to secure land on the Bos Redondo but on account of the exposed condition of that section was allowed to withdraw his claim, it never having been approved by the Commissioner of the General Land Office, and to select the 1863 location, that in question here, and that after the expiration of the time limited by Congress Watts sought, as he claimed to amend the 1863 location, but it was held finally that it was an attempt to relocate which was unauthorized. Consequently the true statement would be that though attempts to select three tracts were made only one was successful. The difficult confusion arises from the fact that the act of Congress authorizes the heirs of Baca to select in square bodies not to exceed five in number and that in question was the third of such five locations to be made and was designated as the "Location No. 3 of the Baca series" or "Baca Float No. 3" for that reason. But as Mr. Franklin states it a person might easily be led to believe the reference in a deed to "Location No. 3 of the Baca series" to be to what Mr. Franklin calls the "third tract" and which is the 1866 location as known in the case.

Mr. Franklin's statement that for thirty-three years from 1866 to 1899 there were two sets of claimants, one claiming the 1866 location and the other the 1863 location, is not true. It is true that Watts conveyed to Hawley and that those claiming under that conveyance acted on the assumption that Baca Float No. 3 was correctly described by the courses and distances of the 1866 location until the decision of the depart-

ment in 1899 and that in 1878 and 1884 Bouldin secured certain instruments in which the particular description was that of the 1863 location but as soon as Bouldin went to the land office he found the true situation and secured title through those claiming under the deed to Hawley.

Starting from the foregoing false premise Mr. Franklin draws the equally false conclusion that the Wises, Santa Cruz Development Company and the intervenors claim under claimants to the 1863 location and that Watts and Davis claim under the 1866 location when all deraign their title from the same source, John S. Watts.

When Mr. Franklin comes to consider the title of Watts and Davis instead of commencing at the beginning and tracing the title down in the usual way and considering the deeds together he begins with the seven deeds to Mathews. This is not the correct way to arrive at a correct interpretation of the deeds.

Mr. Franklin's statement that there is no reference in the deed from Hawley to Robinson to the deed executed by John S. Watts to Hawley being the source of Hawley's title is not understood as the description reads " and by said Watts conveyed to the said Christopher E. Hawley."

The foregoing are some of the misleading statements and conclusions which have been observed. The Prentice cases, upon which so much reliance is placed, are clearly distinguishable from the case at bar in that, among other things, it was impossible from the description there to identity the land.

## Brief of Mr. Brevillier for Santa Cruz Development Co.

On page 8 of his brief Mr. Brevillier makes a point of the fact that Mathews in his petition to the Secretary of the Interior for a reversal of the decision holding the 1866 location void alleged that it was known as Baca Float No. 3.

That was true, but Mathews also knew, and no one ever claimed otherwise, that there was but one Baca Float No. 3. There might be a difference of opinion as to where it was, to what particular land it applied, since it had never been formally segregated from the public domain, but there was no doubt what it was, the third of the five selections authorized by the act of June 21, 1860.

On pages 35 and 36 Mr. Brevillier attacks the letter of March 27, 1864, from John S. Watts to William Wrightson. Upon reference to the record in the case in the Supreme Court it will be seen that that letter was certified from the files of the General Land Office and appears as a part of the proceedings in the case.

The foregoing is not offered as a complete answer to the briefs mentioned but merely to call attention to certain matters which were noted.

## IX.

**The decree of the Court below should be affirmed as to that portion which recognizes the title of Watts and Davis to eighteen-nineteenths of the south half of the 1863 location.**

SAMUEL L. KINGAN,
HARTWELL P. HEATH,
Attorneys for Watts and Davis.

HERBERT NOBLE,
SAMUEL L. KINGAN,
Of Counsel.